United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4150

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ARKAY PACKAGING CORPORATION,

Respondent.

ON APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) and (2) of the Act by promising to grant improved benefits to its employees if they rejected Local 119B as their bargaining representative and chose Local 381 instead.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) and (2)

of the Act by recognizing the Employee Committee as the bargaining representative of its employees at a time when a question existed concerning representation of those employees.

STATEMENT OF THE CASE

This case is before the Court upon an application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, *et. seq.*), for enforcement of its order issued against Arkay Packaging Corporation (hereinafter called "the Company"). The Board's Decision and Order (A. 3-24)[1] was issued on October 24, 1975, and is reported at 221 NLRB No. 10. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred at Hauppauge, New York.

I. THE BOARD'S FINDINGS OF FACT

A. Background: The Company demands a longer work week, and Local 119B refuses

The Company manufactures paper cartons at a plant in Hauppauge, New York (4; 33, 37). For many years prior to the events in question, the Company's finishing department employees were covered by collective-bargaining contracts between Local 119B, Graphic Arts

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[1] "A." references are to the pages of the printed Appendix. References preceding a semi-colon are to the Board's findings of fact; references following a semi-colon are to the evidence supporting those findings.

International Union (hereinafter "Local 119B") and the Printers League, an employer association to which the Company belonged (5; 49-50). In late 1973 the Company withdrew from the Printers League and, in February 1974,[2] began negotiations with Local 119B on an individual basis. Although the last Printers League-Local 119B contract had provided for a 34½-hour work week, the Company in negotiations sought a 37½-hour week. In support of this position, the Company repeatedly pointed out that contracts between area carton manufacturers and Local 381, Folding Box, Corrugated Box and Display Workers Union (hereinafter "Local 381") had such a 37½-hour week. Negotiations proved unsuccessful, and a strike ensued. On July 29, Local 119B filed a petition with the Board's Regional Office seeking certification as the bargaining representative for the plant's finishing department employees (5-7; 41, 53-55).[3] Upon receiving notice of this petition, the Company sent the Regional Office a letter listing the unions with which it had contracts and asserting, "In addition we are advised that Local 381 . . . may claim to represent the employees in the proposed unit" (7; 44, 65). As a result of the Company's assertion, the Regional Office included Local 381 in the list of recipients on two pre-election notices it sent to all interested parties in August. When Local 119B President Hellman questioned Local 381 President Cianciulla about Local 381's inclusion in the list of recipients, Cianciulla told Hellman that to the best of his knowledge, Local 381 was not responsible for its inclusion (7;

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[2] All dates hereinafter mentioned refer to 1974 unless specified otherwise.

[3] This petition was filed jointly with Local 1034, International Brotherhood of Teamsters (7; 41).

62-64). Hellman also questioned Cianciulla several times during the strike about reports that Local 381 members were replacing strikers at the plant; Cianciulla conceded that Local 381 representatives were sending men to the plant, but denied he had anything to do with it (6: 60).

B. The Company promises to grant its employees improved benefits if they reject Local 119B and choose Local 381 instead

During an employee meeting called by the Company on August 22, Company Vice-President Howard Bates delivered a prepared statement which read in pertient part as follows (13-14; 46, 79-80):

> Eventually anyone who is in the plant, should Hellman [Local 119B] win, will not be paying dues to the Bookbinders or getting benefits from the Bookbinders. They will find themselves paying dues to the Teamsters and getting whatever benefits the Teamsters have to offer. They will lose every benefit that they have ever gotten or hope to get under the Bookbinder Welfare and Pension Plans.

Bates then extemporaneously observed, *inter alia*, that Local 381 would be cheaper to join than Local 119B and that if the employees chose Local 381 instead of Local 119B there would be "better benefits for everybody" (15: 85, 89). Six days later, on August 28, Local 119B filed charges leading to the instant case.

C. The Company recognizes the Employee Committee

At the end of January 1975, in order to have some form of representation, plant employees in various departments elected delegates to an Employee Committee (17-18; 73-74, 92-93, 102). Several days after the delegates were elected, Company President Howard Kaneff, Vice-President William Roche, and Plant Superintendent John Rizzo met with the Committee in the Company conference room during working hours. At this meeting the Company and the delegates discussed the general ground rules by which the employees should be represented, as well as specific issues pertaining to work hours, overtime, lateness and absenteeism. The Company and the Committee discussed these matters again at a second meeting on February 4, 1975 (18; 75-77).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that the Company violated Section 8(a)(1) and (2) of the Act by promising to grant improved benefits to its employees if they rejected Local 119B as their bargaining representative and chose Local 381 instead. Applying its *Midwest Piping* rule, the Board also found that the Company violated Section 8(a)(1) and (2) by recognizing the Employee Committee as the bargaining representative of its employees at a time when a question existed concerning representation of those employees. (17-19, 30-32).[4]

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[4] The Board further found that the Company's alleged misconduct in several other instances did not constitute violations of the Act.

The Board's order requires the Company to cease and desist from engaging in the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to withdraw recognition from the Employee Committee and to post appropriate notices (22-23, 30-33).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (2) OF THE ACT BY PROMISING TO GRANT IMPROVED BENEFITS TO ITS EMPLOYEES IF THEY REJECTED LOCAL 119B AS THEIR BARGAINING REPRESENTATIVE AND CHOSE LOCAL 381 INSTEAD

As shown in the Statement (*supra*, p. 4), the undisputed evidence establishes that on August 22, 1974, Company Vice President Howard Bates promised a group of assembled employees that benefits would be better for everybody if they chose Local 381 instead of Local 119B as their bargaining representative. The Administrative Law Judge found that Bates' promise constituted a violation of Section 8(a)(1) and (2) of the Act.[5] The Company did not except to this finding before the Board (A. 25-29), and the finding was consequently affirmed by the Board.

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[5] Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees" in the exercise of their rights under the Act.

Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Under Section 10(e) of the Act, the Company's failure to except before the Board to the finding that Bates' promise was unlawful precludes consideration of that finding before this Court.[6] *N.L.R.B. v. Local 3, Int'l Brotherhood of Electrical Workers*, 362 F. 2d 232, 234-234 (C.A. 2, 1966); *N.L.R.B. v. Park Edge Sheridan Meats*, 323 F. 2d 956, 959 (C.A. 2, 1963). In any event, Bates' promise of better benefits was clearly violative of Section 8(a)(1) and (2) of the Act. See *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F. 2d 218, 221 (C.A. 2, 1970), cert. denied, 400 U.S. 833; *N.L.R.B. v. Ambox, Inc.*, 357 F. 2d 138, 142 (C.A. 5, 1966); *N.L.R.B. v. Clearfield Cheese Co.*, 213 F. 2d 70, 72-73 (C.A. 3, 1954).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (2) OF THE ACT BY RECOGNIZING THE EMPLOYEE COMMITTEE AS THE BARGAINING REPRESENTATIVE OF ITS EMPLOYEES AT A TIME WHEN A QUESTION EXISTED CONCERNING REPRESENTATION OF THOSE EMPLOYEES.

Under the Board's *Midwest Piping* rule,[7] which has repeatedly been approved by this Court in a variety of factual settings,[8] an employer

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[6] Section 10(e) provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[7] *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945).

[8] See *N.L.R.B. v. Midtown Service Co.*, 425 F. 2d 665, 670 (C.A. 2, 1970); *Empire State Sugar Co., Inc. v. N.L.R.B.*, 401 F. 2d 559, 562 (C.A. 2, 1968); *N.L.R.B. v. Burke Oldsmobile, Inc.*, 288 F. 2d 14, 16 (C.A. 2, 1961); *N.L.R.B. v. Henry Heide, Inc.*, 219 F. 2d 46, 49-50 (C.A. 2, 1955), cert. denied, 349 U.S. 952; *N.L.R.B. v. National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2, 1954).

faced with rival representation claims from competing unions violates the Act if it recognizes either union "as the exclusive bargaining agent during the pendency of the rival union's petition for certification." *N.L.R.B. v. National Container Corp., supra,* 211 F. 2d at 536. "This rule is a direct outgrowth of the parent doctrine of employer neutrality in matters relating to employees' choice of a bargaining representative . . . [W]here employees are confronted with a choice of bargaining representatives, the employer may not accord such treatment to one of the rivals as will give it an improper advantage or disadvantage in its contest for the employees' favor." *Ibid.* (citing *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206 (1940)).

Applying the foregoing principles, the Board properly found that the Company violated Section 8(a)(1) and (2) of the Act by recognizing the Employee Committee. The undisputed evidence shows that at the time the Company recognized the Employee Committee, Local 119B had filed a petition to have its representative status certified by the Board (*supra,* pp. 3, 5). There is no evidence that Local 119B - which had represented the employees in their dealings with the Company for many years before negotiations deadlocked in 1974 - did not in fact enjoy the majority support it claimed to have. At the very least, Local 119B had a substantial representation claim which precluded the Company from recognizing any other labor organization as the employees' representative. Indeed, the Company did not even allege that the Employee Committee enjoyed uncoerced majority support, and in light of the Company's unlawful attempt to win the employees away from Local 119B with the promise of better benefits, the Employee Committee could not have enjoyed such uncoerced support. Accordingly, a real question existed

concerning employee representation at the time the Company recognized the Employee Committee, and that recognition was therefore violative of the Act. See, *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F.2d 176, 181-182 (C.A. 8, 1964); *N.L.R.B. v. Trosch*, 321 F.2d 692, 696-697 (C.A. 4, 1963), cert. denied, 375 U.S. 993; *N.L.R.B. v. National Container Corp., supra*, 211 F. 2d at 536.

Before the Board the Company contended that its dealings with the Employee Committee were not unlawful because the Committee was not a labor organization within the meaning of Section 8(a)(2) and 2(5) of the Act.[9] As shown *supra*, p. 5, the Employee Committee consisted of employee delegates elected by their co-workers, and was created in order to give the employees a form of collective representation in dealings with the Company. Committees formed in such a manner and for such a purpose have been uniformly found by this and other courts to be labor organizations under the Act. *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F. 2d 176, 181 (C.A. 2, 1962), cert, denied, 370 U.S. 919; *N.L.R.B. v. Stow Mfg. Co.*, 217 F. 2d 900, 904 (C.A. 2, 1954), cert. denied, 348 U.S. 964. See also *N.L.R.B. v. Clapper's Mfg., Inc.*, 458 F. 2d 414, 418-419 (C.A. 3, 1972); *N.L.R.B. v. Drives, Inc.*, 440 F.2d 354, 359 (C.A. 7, 1971), cert. denied, *sub. nom. gen'l. Drivers, et. al. v. N.L.R.B.*, 404 U.S. 912. Moreover, it is well-settled that a committee like the one involved here need not have any formal structure at all to be deemed a labor organization under the Act. *N.L.R.B. v. Clapper's Mfg., Inc., supra*, 458 F. 2d at 418-419; *Indiana Metal Products Corp. v. N.L.R.B.*, 202 F. 2d 613, 620-621 (C.A. 7, 1953).

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[9] Section 2(5) defines the term "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The Company's remaining defense before the Board, that its dealings with the Employee Committee were not unlawful because they did not amount to recognition of the Committee as the employees' bargaining representative, is equally without merit. As shown *supra*, p. 5, on two occasions prior to the hearing, three of the Company's top officials – its president, its vice president, and its plant superintendent – met with the Employee Committee in the Company conference room during work hours. At both meetings, the parties laid the general ground rules by which the Committee should represent the employees to the Company, and also discussed specific subjects of collective bargaining such as work hours, overtime, lateness, and absenteeism. These dealings warrant a finding that the Company recognized and bargained with the Committee as the employees' representative on matters affecting their terms and conditions of employment. That such bargaining occurred only twice and produced no formal statement of recognition or binding agreement on issues is no impediment to a finding of violation. See, e.g., *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 213-214 (1959) (mere discussion of employment conditions constituted dealing with committee under Section 8(a)(2) and 2(5), despite absence of formal contract or binding agreements); *N.L.R.B. v. Thompson Ramo Woolridge, Inc.*, 305 F. 2d 807, 809-810 (C.A. 7, 1962) (discussions designed to remedy grievances constituted dealing with committee under Act, despite absence of any express recommendations); *Indiana Metal Products Corp. v. N.L.R.B.*, *supra*, 202 F. 2d at 621 (discussions constituted bargaining, even though final decision remained solely with company); *N.L.R.B. Saxe-Glassman Shoe Corp.*, 201 F. 2d 238, 244 (C.A. 1, 1953) (8(a)(2) finding justified, even though Committee met only twice with company before being

disbanded). The Board thus reasonably found that the Company violated Section 8(a)(1) and (2) of the Act by recognizing the Employee Committee.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

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August, 1976

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 27th day of August, 1976.